



Volume 16 | Issue 1

Article 4

2005

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Recommended Citation

Kelli M. Keenan, *Highway to the Danger Zone: Utahns for Better Transportation v. United States Department of Transportation and Problems Associated with Highway Expansion*, 16 Vill. Envtl. L.J. 61 (2005).

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HIGHWAY TO THE DANGER ZONE: *UTAHNS FOR BETTER TRANSPORTATION V. UNITED STATES DEPARTMENT OF TRANSPORTATION* AND PROBLEMS ASSOCIATED WITH HIGHWAY EXPANSION

I. INTRODUCTION

Since 1970, the United States' population has increased by thirty-eight percent and the number of miles Americans drive every year has increased by one hundred and forty-eight percent; yet the amount of new roads built has increased by a mere six percent.¹ Nationally, these increases have led to political lobbyists, environmental groups and construction companies all fighting over billions of dollars in highway funding.² Utah is a state caught in this web of growth and conflict.³ Specifically, by the year 2020, the population of the five counties along the Great Salt Lake's eastern shore in Utah will increase by sixty percent.⁴ Consequently, travel demand in these areas will increase by sixty-nine percent.⁵

Since 1980, the number of miles driven by Utah residents has increased by seventy percent.⁶ The Utah Quality Growth Public/Private Partnership reported that if growth continues, the miles traveled by vehicles each day in northern Utah will double by 2020.⁷ In addition, it is estimated that by 2020 vehicle miles traveled per day in Salt Lake and Davis counties will increase from twenty-five

1. See AMERICAN HIGHWAY USERS ALLIANCE, *Why We Need Highways: Congestion*, available at <http://www.highways.org/subsection.cfm?section=2&subsection=2> (last visited April 3, 2004) (discussing traffic congestion and problems for commuters).

2. See Scott Bowles, *National Gridlock- Traffic Really is Worse Than Ever. Here's Why*, USA TODAY, Nov. 23, 1999, at 1A (citing first study ranking nation's worst chronic traffic jams).

3. See generally Zack Van Eyck, *Salt Lake 41st Most Congested City*, DESERET NEWS, available at <http://deseretnews.com/dn/view/0,1249,515036103,00.html> (Oct. 3, 2003) (noting Utah's travel problems and possible solutions).

4. See *Utahns for Better Transportation v. United States Department of Transportation*, 305 F.3d 1152, 1161 (10th Cir. 2002) [hereinafter *Utahns II*] (discussing population increases in state of Utah).

5. See *id.* (noting travel demand increases in Utah).

6. See Michael Kuzminaki, Note, *Let there be Light, Air and Views: It's Time to Take Another Look at Utah State Road Commission v. Miya*, 18 J. LAND RESOURCES & ENVTL. L. 311 (stating growth in number of miles driven by Utah residents).

7. See *id.* (citation ommited) (discussing results of transportation study). Experts estimate that between 1995 and 2020 urban areas in northern Utah will double in size, and its population will increase by one million. See *id.*

million to fifty million per day.⁸ Recently, the annual Texas Transportation Institute ranked Salt Lake City, Utah as the forty-first most congested metropolitan area in the United States.⁹ In response, the Utah Department of Transportation (UDOT) began analyzing proposed transportation projects to serve Utah's ever-increasing transportation needs.¹⁰ To meet such needs, UDOT has estimated that it will need more than \$13 billion in funding for transportation, but only \$3.6 billion is expected to be available in the future.¹¹

In *Utahns for Better Transportation v. United States Department of Transportation (Utahns II)*,¹² the Tenth Circuit addressed the issue of highway expansion and statutory regulations under the National Environmental Policy Act of 1969 (NEPA) and the Clean Water Act (CWA).¹³ After analyzing the Final Environmental Impact Statement (FEIS), the Tenth Circuit found the FEIS inadequately prepared because it failed to consider the proposed project's environmental impacts and any reasonable alternatives to the project.¹⁴ Additionally, the Tenth Circuit held that the United States Corps of Engineers (Corps) arbitrarily and capriciously issued the required permit under section 404 of the CWA, permitting construction of the proposed project to begin.¹⁵

8. See *id.* (citing Brent Israelsen, *Will New Highway Put Utah Pollution Over the Top?*, SALT LAKE TRIB., Nov. 9, 1997, at A15) (estimating future number of vehicle miles to be traveled).

9. See Van Eyck, *supra* note 3 (discussing annual study of traffic congestion). According to UDOT spokesman Tom Hudachko, "[w]e can't build our way out congestion, but there's definitely things we can do to help manage the demand." *Id.*

10. See Zack Van Eyck, *UDOT is Looking 30 Years Ahead*, DESERET NEWS, available at <http://deseretnews.com/dn/view/0,1249,515036410,00.html> (October 4, 2003) (explaining UDOT released plan dubbed Transportation 2030 for public comment and UDOT's role).

11. See *id.* Utah Department of Transportation has developed a plan named "Transportation 2030", which requires 3.6 billion dollars for projects such as I-84 and I-80 improvements. *Id.*

12. 305 F.3d 1152 (10th Cir. 2002).

13. See *id.* at 1164 (addressing Utahns' arguments that federal agencies violated NEPA and CWA).

14. See *id.* at 1192 (concluding that FEIS was inadequate because federal agencies (1) eliminated railway as alternative, (2) failed to consider alternative sequencing of project and integrating parkway and transit and (3) overlooked impacts on wildlife).

15. See *id.* (holding that Corp's arbitrarily and capriciously issued permit by relying on insufficient information). The Administrative Procedure Act (APA) provides that final agency actions are subject to judicial review if no adequate remedy exists. See *id.* at 1164. The APA enables a court to set aside arbitrary and capricious agency decisions. See *id.*

This Note focuses on the statutory role a federal agency has as protector of the environment and an agency's responsibilities under NEPA and the CWA.¹⁶ Section II of this Note provides a brief summary of the facts of *Utahns II*.¹⁷ Section III examines the relevant legal principles and effects of NEPA, Environmental Impact Statements (EIS), section 404(b) permits of the CWA and relevant past precedent.¹⁸ Section IV discusses the Tenth Circuit's rationale in partly reversing the lower court's decision that the Federal Highway Association (FHWA) and the Corps acted lawfully when they approved the construction of the Legacy Parkway.¹⁹ Section V critically analyzes the Tenth Circuit's decision, focusing on issues that the court glossed over, but could have affected the court's final decision.²⁰ Lastly, Section VI concludes by assessing the potential impact the Tenth Circuit's decision could have on future highway projects and the roles of various federal agencies in protecting the environment.²¹

II. FACTS

In July 1996, responding to Utah's growing transportation problems, Utah's governor announced plans to construct a new highway called the Legacy Parkway.²² The overall interstate highway plan proposed to construct a four-lane, 14-mile, state-funded highway known as the Legacy Parkway, to expand Interstate 15 and to expand public transit.²³ The Legacy Parkway landed at the heart

16. See 33 U.S.C. § 1344(a) (2001) (providing primary basis for federal wetlands regulation); 42 U.S.C. §§ 4321-4332 (2001) (describing process federal agencies must follow to assess particular action's environmental impacts).

17. For discussion of the facts of *Utahns II*, see *infra* notes 22-44 and accompanying text.

18. For a further discussion of the underlying principles behind NEPA, EIS and CWA section 404 and relevant case law, see *infra* notes 45-110 and accompanying text.

19. For a further discussion of the Tenth Circuit's analysis, see *infra* notes 111-65 and accompanying text.

20. For a critical analysis of the Tenth Circuit's decision, see *infra* notes 166-202 and accompanying text.

21. For a further discussion of the impact of the Tenth Circuit's decision, see *infra* notes 203-12 and accompanying text.

22. See *Utahns II*, 305 F.3d 1152, 1161 (10th Cir. 2002) (stating that Mayor Ross C. Anderson announced highway plan to meet Utah's travel needs and population increases).

23. See *Utahns for Better Transportation v. United States Department of Transportation*, 180 F. Supp. 2d 1286, 1288 (D. Utah 2001) [hereinafter *Utahns I*] (describing proposed highway project). The highway project approved by FHWA provided for:

a four-lane, limited access, divided highway extending approximately 22.5 kilometers (14 miles) from I-215 at 2100 Moth in Salt Lake City, Utah,

of the three-part plan known as the "Shared Solution", which Utah's officials developed to solve future transportation problems.²⁴ The Legacy Parkway would connect to the current interstate highway system; however, this would involve filling 114 acres of wetland.²⁵

Naturally, filling wetlands required approval from the FHWA and a section 404(b) permit from the Corps.²⁶ As part of this approval process, UDOT and its private contractors started preparing a Draft Environmental Impact Statement (DEIS) following the Governor's announcement in 1996.²⁷ Then, in June 2000, the FHWA and the Corps decided to adopt UDOT's DEIS, and subsequently released a Final Environmental Impact Statement (FEIS) for public review.²⁸

In December 2000, before the federal agencies even approved the project, UDOT awarded private contractors the contract for constructing the Legacy Parkway.²⁹ A month later, the Corps re-

northward to I-15 and U.S. 89 near Farmington City, Utah. The Legacy Parkway is located within both Salt Lake City County and Davis County. Overpasses (no access) will be provided at Center Street in North Salt Lake, and Glovers Lane, State Street, and Burke Lane in Farmington. Underpasses will be provided at Sheep Road, Denver & Rio Grande (D&RG) Rail Road, and 1250 West in Centerville. Interchanges will be provided at I-215 in Salt Lake City, 5000 South in Woods Cross, Parrish Lane in Centerville, and I-15/U.S. 89 in Farmington. The Legacy Parkway is fully funded by the State of Utah.

Id.

24. See *Utahns II*, 305 F.3d at 1161 (outlining Utah's proposed transportation plan). The plan included expanding Interstate 15 and mass transit and building the Legacy Parkway. See *id.* The plan intended to prepare Utah's infrastructure to meet future population and travel demands. See *id.* The Legacy Parkway would be "330 feet wide consisting of four lanes, a 65.6-foot median, a 59-foot berm and utility corridor, and a 13.1-foot pedestrian/equestrian/bike trail." *Id.* (describing proposed layout of Legacy Parkway).

25. See *id.* (discussing environmental effects of proposed project). The wetlands surrounding this area provide a habitat for various birds, reptiles, amphibians and mammals, some of which are endangered. See *id.* Utah's total land area consists of only 1.5 percent wetlands. See *id.* The Legacy Parkway will connect to highway US 89, qualifying it as a federal action. See *id.*

26. See *id.* (noting project must receive FHWA approval and permit from Corps because it requires filling wetlands and connecting new highway to interstate highway system).

27. See *id.* (noting that drafting EIS was necessary because project was major federal action that required FHWA and Corp approval).

28. See *id.* at 1161 (stating timeline of process for approving project and granting permit). Section 102(2)(C) of NEPA requires all federal agencies to prepare an EIS prior to taking a major federal action, an action with major effects on the environment and which are potentially subject to federal control. 42 U.S.C. § 102(2)(c) (2001) (outlining NEPA requirements).

29. See *Utahns II*, 305 F.3d at 1162 (outlining steps taken for project approval); Legacy Parkway Project, available at <http://www.udot.utah.gov/legacy/> (last visited

leased its Record of Decision (ROD) that granted UDOT the required section 404(b) permit.³⁰ Thereafter, the FHWA issued its ROD approving UDOT's requests to add and modify the current interstate highway system's access points.³¹

Utah residents and Salt Lake City's Mayor strongly opposed the proposed project immediately after the Corps granted UDOT the section 404 permit and the FHWA approved UDOT's request for highway additions and modifications.³² Utahns found the proposed highway project highly problematic, claiming that other less environmentally damaging alternatives existed.³³ Despite this opposition, constructing the Legacy Parkway began in January 2001.³⁴

The plaintiffs, Utahns for Better Transportation, Mayor Rocky Anderson and the Sierra Club (collectively, Utahns) commenced an action in the United States District Court for the District of Utah, Northern Division against the Corps, the FHWA and UDOT, among other defendants.³⁵ Specifically, the Utahns asked the court to vacate the Corp's decision to grant the section 404 permit for constructing the highway.³⁶ They also urged the court to reject the FEIS and order the FEIS be revised or supplemented.³⁷ In support of these claims, the Utahns contended that the FEIS failed to consider possible practicable alternatives to constructing the Legacy

April 3, 2004) (describing Legacy Parkway Project on UDOT's official website). UDOT and its private contractors, Fluor Ames Kramer, began preparing a DEIS immediately after the transportation plan was announced. *See Utahns II*, 305 F.3d at 1161.

30. *See Utahns II*, 305 F.3d at 1161 (outlining approval process); *see generally* 33 U.S.C. § 1344 (2001).

31. *See Utahns II*, 305 F.3d at 1161 (describing FHWA's ROD).

32. *See Utahns I*, 180 F. Supp. 2d. 1286, 1288 (D. Utah 2001) (determining whether FHWA and Corps acted lawfully). The residents and the mayor of Salt Lake City wanted public transit expanded before constructing a highway that would go through the wetlands. *See id.*

33. *See id.* at 1287-88 (explaining Utahns' chief arguments). They wanted the federal agencies to conduct further environmental impact analysis. *See id.* (discussing Utahns' judicial remedy sought).

34. *See* Legacy Parkway Project: History available at <http://www.udot.utah.gov/legacy/Project%20History.htm> (last visited April 3, 2004) (discussing "Shared Solution" and Legacy Parkway). UDOT and Fluor Ames Kraemer decided to limit work on the Legacy Parkway to the northern part of the project because of potential lawsuits. *See id.* (describing proposed construction of Legacy Parkway).

35. *See Utahns I*, 180 F. Supp. 2d. at 1286-88 (explaining that remand is remedy sought so federal agencies can perform NEPA and CWA analysis).

36. *See id.* at 1287 (stating Utahns believed federal agencies violated both CWA and NEPA).

37. *See id.* (stating remedy sought by Utahns).

Parkway and did not address the project's adverse impacts on the surrounding environment.³⁸

The Utah District Court determined that it must decide only one question: whether the Corps and the FHWA complied with the law when it issued its ROD.³⁹ The district court found that the Corps complied with the law, and therefore, it upheld the ROD.⁴⁰ The court concluded that neither the Corps nor the FHWA violated NEPA or the CWA.⁴¹ Furthermore, the court denied the Utahns' request to revise or supplement the EIS.⁴² According to the district court, though the federal agencies could have produced a more thorough EIS, the agencies did not consider alternatives in an arbitrary or capricious manner.⁴³ The Utahns appealed this case to the Tenth Circuit based on the district court's decision.⁴⁴

III. BACKGROUND

A. National Environmental Policy Act of 1969

During the late 1960s, Congress observed that federal agencies lacked environmental awareness because many of their policies conflicted with the "general public interest."⁴⁵ Consequently, Con-

38. See *Utahns II*, 305 F.3d 1152, 1162 (10th Cir. 2002) (addressing Utahns' claim that federal agencies violated CWA and NEPA when agencies did not properly and sufficiently evaluate environmental impacts and ignored other NEPA requirements).

39. See *Utahns I*, 180 F. Supp. 2d at 1288 (categorizing question presented in case as narrow). The district court was not asked to decide whether the FHWA's approval or the section 404(b) permit should have been granted or whether the Legacy Parkway should have been built. See *id.* (explaining issues addressed by district court).

40. See *id.* at 1292-93 (ruling in favor of Legacy Parkway Project).

41. See *id.* at 1293. While the court did not agree with the Agencies' decisions, the district court concluded that the FHWA and the Corps decisions regarding the Legacy Parkway were lawful under NEPA or the CWA. See *id.* at 1292.

42. See *id.* at 1291 (finding that FEIS satisfied NEPA requirements in form and content).

43. See *id.* at 1292-93 (explaining holding of case). The court reasoned that the Agencies could have taken a "harder look" at environmental impacts and reasonable alternatives, but that did not mean the federal agencies' evaluations violated NEPA. See *id.* at 1292 (stating what analysis satisfies NEPA). After the district court's decision was rendered, work on the project restarted. See *UDOT Legacy Park Project: History available at* http://www.udot.utah.gov/legacy/Project%20_History.htm (last visited April 3, 2004) (describing events behind and history of Legacy Parkway). Work progressed until the Tenth Circuit issued an injunction. See *id.*

44. See *Utahns II*, 305 F.3d 1152, 1161 (10th Cir. 2002) (stating grounds for appeal).

45. See Maria C. Holland, Comment, *Judicial Review of Compliance with the National Environmental Policy Act: An Opportunity for the Rule of Reason*, 12 B.C. ENVTL. AFF. L. REV. 743, 757 (1985) (addressing policies behind NEPA and its legislative history).

gress enacted NEPA to hold the federal government responsible for protecting and preserving the environment.⁴⁶ Soon after its enactment, environmental groups and politicians acknowledged NEPA as one of the most important environmental laws, claiming NEPA triggered the “environmental decade” of the 1970s.⁴⁷

According to the United States Supreme Court, NEPA has “twin aims”.⁴⁸ First, it forces federal agencies to “consider every significant aspect of the environmental impact of proposed action.”⁴⁹ Second, NEPA requires that a federal agency inform the public of the proposed action’s possible environmental impacts and explain how the agency addresses those impacts.⁵⁰ “The thrust of the [NEPA] is . . . that environmental concerns be integrated into the very process of agency decision-making.”⁵¹

NEPA prescribes steps federal agencies must follow when considering a proposed action’s environmental impacts.⁵² It provides

46. *See id.* (explaining purpose of enacting NEPA). Before NEPA, a federal agency decision-maker had little, if any, information on the environmental impacts of a proposed action. *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 COLUM. L. REV. 903, 910 (2002) (noting agencies were not required to compile environmental information before enactment of NEPA).

47. *See* Karkkainen, *supra* note 46, at 904 (discussing NEPA’s role in assessing government’s environmental performance).

48. *See* *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983) (discussing goals of NEPA).

49. *See id.* (holding that Nuclear Regulation Commission complied with NEPA’s requirements of considering environmental consideration and disclosing EISs).

50. *See id.*; *see also*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (noting that NEPA “guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”).

51. *Davis v. Mineta*, 302 F.3d 1104, 1115 (10th Cir. 2002) (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979)) (explaining relationship between environmental process and agency actions).

52. *See* 42 U.S.C. §§ 4321-4332 (2001) (describing NEPA requirements and procedures). NEPA provides:

The Congress authorizes and directs to the fullest extent possible:

- (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and
- (2) all agencies of the Federal Government shall
 - (A) utilize a systematic, interdisciplinary approach . . . in planning and in decisionmaking which may have an impact on man’s environment;
 - (B) identify and develop methods and procedures . . . which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
 - (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affect-

that agencies take a “hard look” at the proposed action’s environmental consequences by using public comment and credible scientific information.⁵³ Accordingly, NEPA mandates a federal agency to conduct an Environmental Assessment when proposing legislation or taking a federal action that may impact the environment.⁵⁴ NEPA requires federal agencies to produce and publicly issue a detailed statement on the proposed action’s environmental impacts, which is commonly known as an Environmental Impact Statement.⁵⁵

When faced with a NEPA issue, a court must determine two issues.⁵⁶ First, the court must decide whether the federal agency acted “arbitrarily and capriciously” when considering the action’s environmental impact.⁵⁷ Second, it must determine whether the

ing the quality of the human environment, a detailed statement by the responsible official on

42 U.S.C. § 4332 (2001).

53. See *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001); see generally 42 U.S.C. § 4332(2)(C) (2001) (assessing what “hard look” analysis entails). NEPA states that all federal agencies must:

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C) (2001).

54. See 42 U.S.C. § 4332 (2001) (describing required federal agency cooperation and reports); see also Council on Environmental Quality, NEPA and Agency Planning, Terminology and Index, 40 C.F.R. pts. 1501.4, 1508.9 (2003) (detailing Environmental Assessment requirement).

55. See *Karkkainen*, *supra* note 46, at 909 (discussing paperwork requirements of NEPA). Nevertheless, NEPA does not require that an agency reach a particular conclusion. See *Custer County*, 256 F.3d at 1034 (citing *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1171-72 (10th Cir. 1999)) (quotation marks and citations omitted) (noting NEPA allows agencies to make decisions, but agencies need to meet statutory requirements). Federal agencies do not have to give more weight to environmental concerns over other appropriate considerations. See *Citizens’ Comm. to Save Our Canyons v. United States Forest Serv.*, 297 F.3d 1012, 1022 (10th Cir. 2002) (determining that “hard look” requirement is satisfied when agency develops required EIS).

56. See *Utahns II*, 305 F.3d 1152, 1163 (10th Cir. 2002) (explaining how courts handle NEPA cases).

57. See *id.* (stating federal agencies cannot make arbitrarily and capricious decisions when approving proposed actions). The Administrative Procedure Act al-

agency properly disclosed accurate and sufficient information to the public.⁵⁸

B. Environmental Impact Statements

NEPA mandates that federal agencies prepare an EIS as a way to make them responsible for any environmental impacts.⁵⁹ Congress required EISs to achieve NEPA's statutory goal of instilling environmental awareness in agency decision-making.⁶⁰ An EIS serves two purposes: (1) to ensure that federal agencies have adequate information about the action's potential environmental impacts and any reasonable and practicable alternatives to the proposed actions; and (2) to inform the public of any potential environmental impacts of the proposed action.⁶¹ This forces federal agencies to use an organized approach when planning and proposing projects.⁶² As a result, the EIS provides for a thorough discussion of significant potential environmental impacts, which federal agencies have historically overlooked.⁶³

An adequately prepared EIS lists any reasonable alternatives to a proposed action, publicly discloses all potential environmental impacts and considers the public's response to the proposed ac-

lows courts to set aside any arbitrary or capricious agency action. 5 U.S.C. § 704 (2001) (outlining APA's judicial review).

58. See *Utahns II*, 305 F.3d at 1163 (stating that agency must publicly disclose environmental impacts of project).

59. See Holland, *supra* note 45, at 767 (describing federal agencies as accountable for environmental impacts of federal actions).

60. See 42 U.S.C. § 4321 (2001) (defining purpose of NEPA); see also Council on Environmental Quality, Purpose, Policy, and Mandate, 40 C.F.R. pt. 1500.1 (2003) (describing purpose of EIS).

61. See Holland, *supra* note 45, at 769 (explaining these standards hold federal agencies responsible for consequences and effects of its actions).

62. See *id.* (noting that Congress' enacted EIS requirement to enforce federal agencies to follow specified procedures).

63. See Council on Environmental Quality, Environmental Impact Statement, 40 C.F.R. pt. 1502.1 (2003). Section 1502.1 provides:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. . . . An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

Id.

tion.⁶⁴ Of utmost importance, NEPA requires that all federal agencies prepare an adequate EIS before undertaking a “major federal action”.⁶⁵ A “major federal action” is an action that significantly affects human environmental quality.⁶⁶ Additionally, major federal actions often are subject to federal control and responsibility.⁶⁷

1. *Conflicts of Interest*

Under federal law, a federal agency may either draft the EIS itself or select a contractor to draft its EIS.⁶⁸ A conflict of interest may arise when a federal agency does the latter.⁶⁹ When an agency selects a contractor to prepare its EIS, the contractor must “execute a disclosure statement . . . specifying that [it has] no financial or other interest in the outcome of the project.”⁷⁰ If a conflict arises, the agency should disqualify the contractor from preparing its EIS.⁷¹

Determining if a conflict exists, however, is not always easy. For example, the Court of Appeals for the Tenth Circuit found no conflict of interest existed when the Colorado Department of Transportation (CDOT) supervised the hired contractor, protecting the EIS’ integrity in *Ass’n Working for Aurora’s Residential Environ-*

64. See Elizabeth A. Roche, Note, *The Continuing Saga of Rippling Puddles, Small Handles and Links of Chains: Wetlands Action Network v. United States Army of Corps of Engineers*, 13 VILL. ENVTL. L.J. 119, 130 (2002) (examining EIS purpose and function). “The environmental impact statement serves the purpose of providing information to allow ‘agency officials [to] make the best informed decisions based upon an understanding of the environmental consequences of their actions.’” Melaney Payne, Note, *Critically Acclaimed But Not Critically Followed- The Inapplicability of the National Environmental Policy Act to Federal Agency Actions: Douglas County v. Babbitt*, 7 VILL. ENVTL. L.J. 339, 349 (1996) (defining components of properly drafted impact statement).

65. See 42 U.S.C. § 4332(c) (2001) (requiring EIS for major federal actions).

66. See *id.* (explaining major federal action); see also Jason J. Czarnecki, Comment, *Defining the Project Purpose Under NEPA: Promoting Consideration of Viable EIS Alternatives*, 70 U. CHI. L. REV. 599, 601 (2003) (discussing process and benefits of EIS).

67. See Council on Environmental Quality, Terminology and Index, 40 C.F.R. pt. 1508.18 (2003) (defining major federal action).

68. See Council on Environmental Quality, Other Requirements of NEPA, 40 C.F.R. pt. 1506.5(c) (2003) (noting who may prepare EIS). If a contractor drafts an EIS, the lead federal agency must guide the contractor in preparing the EIS. See *id.* (stating agency’s role in EIS preparation).

69. See *Ass’n Working For Aurora’s Residential Environment v. Colorado Dep’t of Transportation*, 153 F.3d 1122, 1127 (10th Cir. 1998) [hereinafter AWARE] (holding that no conflict of interest arose when subcontractor helped prepare EIS).

70. See *id.* at 1128 (citation omitted) (explaining when disclosure statement is required).

71. See *id.* at 1129 (quoting Forty Most Asked Questions Concerning CEO’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,031 (March 23, 1981)) (stating when contractor should be disqualified).

ment v. Colorado Dep't of Transportation (AWARE).⁷² In *AWARE*, the Plaintiff contended that the EIS should have been invalidated because the contractor, who drafted the EIS, had an incentive to favor a construction project over a non-construction alternative.⁷³ The Tenth Circuit, despite other courts' conflicted interpretations, determined that a conflict of interest exists when a contractor has an agreement or a guarantee of future work with the project or the agency.⁷⁴ In *AWARE*, however, the contract between CDOT and the contractor did not involve such arrangement, eliminating any conflict of interest.⁷⁵

Similarly, in *Northern Crawfish Frog (Rana Areolata Circulosa) v. The Federal Highway Administration*,⁷⁶ the Plaintiffs argued that the federal agency's FEIS should be invalidated because the proposed project would benefit clients of the contractor who prepared the EIS.⁷⁷ Moreover, the Plaintiffs argued that the engineering firm involved had a financial interest in the project's outcome as it would profit from the business opportunities the project would create.⁷⁸ The Kansas District Court held that no conflict of interest existed on a contractor's part because the contract contained no guarantees of future work, and the contractor would not receive a financial benefit from constructing the project.⁷⁹ Thus, the court determined that, even if a conflict of interest existed, it would not compromise the integrity behind the environmental process.⁸⁰

72. *See id.* According to the record on appeal, CDOT adequately supervised the EIS process. *See id.* CDOT independently and thoroughly reviewed all of the contractor's analyses. *See id.*

73. *See id.* at 1127 (outlining source of potential conflict of interest).

74. *See AWARE*, 153 F.3d at 1128 (explaining when conflict of interest may occur). The Corps has inconsistently interpreted "conflict of interest" in the past, but currently it states that, absent an agreement to construct the proposed project or actual ownership of the construction site, it is unlikely a conflict of interest exists. *Id.* at 1127 (stating that FHWA also has had difficulty defining "conflict of interest").

75. *See id.* at 1128 (holding that CDOT overseeing contractor's preparation of EIS cured any potential conflict of interest).

76. 858 F. Supp. 1503 (D. Kansas 1994).

77. *See id.* at 1525 (explaining Plaintiff's arguments). The Plaintiffs also challenged the FEIS' adequacy by arguing that the FEIS failed to consider reasonable alternatives and the project's cumulative and indirect impacts. *See id.* at 1520.

78. *See id.* (stating Plaintiff's argument that conflict of interest existed because engineering firm, contracted to assist in preparing DEIS, would profit).

79. *See id.* at 1529 (determining EIS was adequate because no conflict of interest existed).

80. *See id.* (finding, even if NEPA was violated, integrity of NEPA process was not compromised).

2. Project Segmentation

Federal agencies often try to avoid NEPA because the Act creates additional procedures and requires the agencies to complete additional paperwork to receive federal funding.⁸¹ Federal agencies, however, may not avoid NEPA requirements by segmenting a large project into small component parts.⁸² Generally, segmenting projects is improper for purposes of preparing EISs.⁸³ When drafting an EIS, connected actions should be discussed in the same EIS, as should actions that have common characteristics such as timing and geography.⁸⁴ In determining the appropriate scope of an EIS, courts usually consider whether the proposed segment: (1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects.⁸⁵

In segmentation cases, some courts have adopted an independent utility test.⁸⁶ When applying the independent utility test, courts often find in favor of federal agencies and against environmental groups.⁸⁷ For example, in *Custer County Action Ass'n v. Gar-*

81. See Brigham Daniels, *A Legacy of Conflict: Utah's Growth and the Legacy Highway*, 1 HINCKLEY JOURNAL OF POLITICS, 51, 55 (1998) available at <http://www.lib.utah.edu/epubs/hinckley/v1/daniels.html> (last visited April 5, 2004) (discussing potential conflicts of interest that exist in Legacy Parkway Project).

82. See Terrence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environmental Policy Act*, 20 ENVTL. L. 611, 631, (1990) (discussing how courts have treated NEPA cases dealing with segmentation of large highway projects into smaller components).

83. See *Village of Los Ranchos de Albuquerque v. Barnhart*, 906 F.2d 1477, 1483 (10th Cir. 1990) (discussing NEPA requirements).

84. Council on Environmental Quality, Terminology and Index, 40 C.F.R. pts. 1508.25(a)(1),(3) (2003) (explaining scope of EIS); see *Utahns II*, 305 F.3d 1152, 1182 (10th Cir. 2002) (noting that NEPA instructs federal agencies not to segment project as way to make significant cumulative impacts appear less significant). A connected action is defined as being closely related to other actions, and are identified by the following three factors: (1) does the action automatically trigger other actions that may require environmental impact statements; (2) the action cannot or will not proceed unless other actions are taken previously or simultaneously; and (3) is the action an interdependent part justified in a larger action. Council on Environmental Quality, Terminology and Index, 40 C.F.R. pt. 1508.25(a)(1)(i)-(iii) (2003) (defining connected action).

85. *Utahns II*, 305 F.3d at 1182 (recognizing general rule against segmentation does not apply in every situation).

86. See Thatcher, *supra* note 82, at 631 (explaining that under independent utility test portion of highway could be lawfully segmented if it could logically proceed on its own).

87. See Roche, *supra* note 64, at 150 (analyzing court's ruling in *Wetlands Action Network v. United States Army Corps of Eng'rs*).

vey,⁸⁸ the Tenth Circuit applied the independent utility test and found that the segmentation was appropriate and permissible.⁸⁹

In *Custer County*, the county contended that approval of the Colorado Airspace Initiative violated NEPA.⁹⁰ The Colorado Airspace Initiative proposed changes to the National Airspace System, which would provide training airspace for Colorado's Air National Guard and address changes in the commercial airlines' arrival and department corridors at a Denver airport.⁹¹ The county argued that the FEIS was inadequate because of improper segmentation.⁹² Specifically, the county insisted that only one EIS should have been prepared, addressing the nationwide environmental impacts, as well as the local environmental impacts of the military airspace.⁹³ The Tenth Circuit rejected the county's argument, concluding that the Initiative could logically and rationally go forward independent of the other military proposals across the United States.⁹⁴

Likewise, in *Piedmont Heights Civic Club, Inc. v. Moreland*,⁹⁵ the Fifth Circuit held that the federal agencies properly segmented the transportation projects.⁹⁶ This case arose when individual FEISs for three segments of a highway improvement plan were filed.⁹⁷ The Plaintiffs argued that the transportation project required only one EIS for all three segments because the segments *collectively*, not independently, reduced traffic.⁹⁸ Accordingly, the Plaintiffs urged that the FEIS was inadequate on the basis that the project was improperly segmented under NEPA.⁹⁹

88. 256 F.3d 1024 (10th Cir. 2001)

89. *See id.* at 1037 (determining that projects having independent utility are not connected actions requiring one EIS).

90. *See id.* (addressing Custer County's NEPA claim based on inadequate FEIS).

91. *See id.* at 1028 (outlining proposed initiative).

92. *See id.* The court found that neither the record indicated nor the county presented evidence of a clear nexus between the challenged Initiative and the other military airspace proposals across the United States. *See id.*

93. *See Custer County*, 256 F.3d at 1037 (addressing challenge to FEIS's adequacy).

94. *See id.* (holding that federal agencies properly segmented project under NEPA).

95. 637 F.2d 430 (5th Cir. 1981)

96. *See id.* at 439-40 (rejecting claim that separate EISs were needed for each separate highway system project).

97. *See id.* at 433 (explaining highway improvement plan). The plan contained three segments: (1) the Downtown Connector, (2) Brookwood and (3) DeKalb I-85. *See id.* (describing three segments of plan).

98. *See id.* at 439-40 (emphasis added) (addressing Plaintiff's claim of that project was improperly segmented, and violated NEPA).

99. *See id.* at 439-42 (detailing grounds for Plaintiff's claim that FEIS was inadequate).

According to the Fifth Circuit, independent utility test determines whether the segment is a separate project or merely a method to avoid NEPA requirements.¹⁰⁰ In *Piedmont*, the court held that each segment of the project had its own transportation purpose - reducing traffic.¹⁰¹ Relying on precedent from other circuit courts, it concluded that projects can have independent utility if they are interrelated as part of an overall transportation plan.¹⁰²

C. Section 404 of the Clean Water Act

The Government regulates and protects wetlands through section 404 of the CWA.¹⁰³ Section 404 prohibits the filling or dredging of wetlands without first obtaining a section 404(b) permit from the Corps or the Environmental Protection Agency (EPA).¹⁰⁴ Both the Corps and EPA have regulatory authority in issuing section 404(b) permits.¹⁰⁵

Under section 404(b)(1), the Corps decides whether to issue a permit using substantive criteria developed by EPA.¹⁰⁶ The criteria, known as the section 404(b)(1) Guidelines, establishes a four-prong test.¹⁰⁷ Under this test, the Corps will not issue a permit if a

100. See *Piedmont*, 637 F.2d at 440 (explaining purpose of independent utility test). "The more important inquiry in such a situation is whether the projects have independent utility." *Id.*

101. See *id.* (determining that each segment served its transportation purpose regardless if other projects get built).

102. See *id.* at 441 (finding that interrelated parts of overall plan individually contributed to improving traffic problems).

103. See 33 U.S.C. § 1344 (2001) (establishing federal wetlands regulation).

104. See *id.* at § 1344(a) (requiring permit to discharge or fill material into waters).

105. See Roche, *supra* note 64, at 127-28 (explaining Corps' authority over various permit decisions). EPA also controls the regulation of wetlands, its enforcement extends only to state-issued permits. See *id.* at 127-28, n. 57 (citation omitted) (stating limits of EPA's control).

106. See 33 U.S.C. § 1344(b)(1) (2001) (noting that guidelines shall be based on criteria similar to that pertaining to territorial seas, contiguous zone and ocean under section 1343(c)).

107. See Environmental Protection Agency, Compliance with the Guidelines, 40 C.F.R. pt. 230.10 (2004). First, the Corps cannot issue a permit for dredged or fill material if a practicable alternative to the proposed discharge exists, and such alternative would have less adverse impact on the aquatic ecosystem. *Id.* at pt. 230.10(a). Second, the Corps cannot issue a permit for the discharge of dredged or fill material if the activity causes or contributes to violating state water quality standards, applicable toxic effluent standards, the Endangered Species Act or the Marine Protection, Research and Sanctuaries Act of 1972. *Id.* at pt. 230.10(b)(1)-(4). Third, the proposed activity cannot significantly contribute to the degrading of United States waters. *Id.* at pt. 230.10(c). Fourth, the Corps cannot issue a permit unless appropriate and practicable steps have been taken to minimize the potential adverse impacts of discharge on the aquatic ecosystem. *Id.* at pt. 230.10(d).

practicable alternative exists that has less adverse environmental impacts than the proposed project.¹⁰⁸ A practicable alternative is an available alternative that can be done after considering cost, technology and logistics.¹⁰⁹ Further, for actions subject to NEPA, the Corps will have sufficient paperwork and information to determine whether to issue a permit.¹¹⁰

IV. NARRATIVE ANALYSIS

In *Utahns II*, the Tenth Circuit addressed whether claimed deficiencies in a Final Environmental Impact Statement were merely “flyspecks” or whether they carried significant weight to defeat the goals of informed decision-making and public comment.¹¹¹ To answer these questions, the Tenth Circuit analyzed the requirements of the National Environmental Policy Act and the Clean Water Act for evaluating a project’s impact on the environment.¹¹² In light of these Acts, the Tenth Circuit held that the FEIS was inadequate and that the Corps arbitrarily and capriciously issued a Section 404(b) permit.¹¹³

108. See *id.* at pt. 230.10(a) (noting that practical alternative cannot have other significant adverse environmental consequences).

109. See *id.* at pt. 230.10(a)(3) (defining practicable alternative). The presumption that a practicable alternative exists for a non-water dependent project does not automatically result in no permit, but the applicant must make a very persuasive showing that no alternative exists. *Sylvester v. United States Army Corps of Eng’rs*, 882 F.2d 407, 409 (9th Cir. 1989) (emphasis added) (explaining permit applicant’s burden).

110. See 40 C.F.R. pt. 230.10(a)(4) (stating it may be necessary to supplement NEPA paperwork if agency failed to consider specific alternatives or did not provide enough detail of these alternatives).

111. *Utahns II*, 305 F.3d 1152, 1163 (10th Cir. 2002) (citing *Custer County Action Ass’n v. Garvey*, 256 F.3d 1024, 1036, 1340 (10th Cir. 2001)).

112. See *id.* at 1164 (stating court applied APA’s arbitrary and capricious standard to review district court’s decision). An agency’s administrative decisions can only be set aside for “substantial procedural or substantive reasons”, and “the court cannot substitute its judgment for that of the agency.” *Id.* (citing *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996)) (explaining when court decision can be set aside).

113. See *id.* at 1192 (affirming in part and reversing and remanding in part lower court’s decision). The Tenth Circuit determined the FEIS was inadequate on the following grounds: elimination of D&RG as a practicable alternative, failure to consider alternative sequencing of the project, failure to consider integrating the Legacy Parkway and public transit, and failure to consider impacts on wildlife. *Id.* Moreover, the Tenth Circuit concluded that the Corps arbitrarily and capriciously issued the section 404(b) permit because the permit lacked sufficient information to determine whether D&RG was a practicable alternative, the permit failed to consider whether a narrower median was a practicable alternative and it did not consider the impacts to wildlife. *Id.*

A. NEPA

1. *Practicable Alternative*

In determining whether an adequate FEIS was produced, the Tenth Circuit addressed whether there were practicable alternatives with less adverse environmental impacts.¹¹⁴ The Utahns contended that there were at least three practicable alternatives to the Legacy Parkway that would have reduced the highway project's environmental impact.¹¹⁵

a. *Denver & Rio Grande (D&RG) Regional Alignment and Cost Analysis*

The Utahns argued that the Agencies violated NEPA by eliminating D&RG as a practicable alternative in the FEIS.¹¹⁶ Specifically, the Utahns claimed that the Agencies violated NEPA by eliminating D&RG as an alternative without verifying the cost estimates supplied by UDOT.¹¹⁷ The Agencies argued that they eliminated D&RG based on its high cost and its significant impact on the environment.¹¹⁸ The Agencies also argued that UDOT thoroughly considered using a right of way for future light rail and mass transit.¹¹⁹ The Tenth Circuit applied a cost analysis to determine if the federal agencies truly considered D&RG as a practicable alternative.¹²⁰ In conducting this analysis, the Tenth Circuit empha-

114. *See id.* at 1164 (reasoning that practicable alternatives cannot be speculative).

115. *See id.* (arguing practicable alternatives to Legacy Parkway included aligning highway differently, narrowing highway configuration and implementing mass transit alternative).

116. *See Utahns II*, 305 F.3d at 1163. D&RG was one of two alternatives for the Railroad Alignment, which was one of five regional alignments discussed in the FEIS. *See id.* at n.3.

117. *See id.* at 1165 (noting record did not show that UDOT confirmed cost estimates supplied or that they responded to public comments submitted by Utahns).

118. *See id.* at 1164-65 (explaining why federal agencies eliminated D&RG as alternative).

119. *See id.* The FEIS did mention that various organizations suggested preserving D&RG right of way for future commuter rail use. *See id.* at 1165 (citation omitted). Yet, the FEIS did not use this reason to eliminate D&RG as an alternative. *See id.*

120. *See id.* at 1165. The FEIS stated D&GR was rejected because the Legacy Parkway would cost less; a \$300 million estimate was made for the Legacy Parkway whereas a \$460 million estimate was made for D&RG. *See id.* (citing III Aplee, App. 931.2-31.3) (discussing cost estimates).

sized that all information contained in the FEIS must be accurate, and a federal agency must verify such accuracy.¹²¹

After examining UDOT's process in analyzing costs, the Tenth Circuit held that the Agencies failed to correctly verify the project's cost estimates supplied by UDOT.¹²² The Tenth Circuit stated that when a federal agency is determining the project's costs and alternatives, it must do more than meet technical requirements.¹²³ The court, however, recognized that an agency's estimate need not be extremely detailed, but it must state an approximated cost.¹²⁴ Thus, the Agencies' failure to determine an approximate cost led the Tenth Circuit to hold that the FEIS did not meet NEPA requirements.¹²⁵

2. Sequencing the "Shared Solution" as an Alternative

Another flaw in the FEIS was the failure to consider the sequencing of the "Shared Solution" as a viable alternative.¹²⁶ The Utahns argued that constructing the "Shared Solution" in a different sequence was a reasonable alternative to the proposed project.¹²⁷ Alternative sequencing would require agencies to alter the order of the project construction to achieve less environmentally damaging results; here, the Utahns proposed to first expand the public transit system to learn if this less environmentally harmful alternative would reduce traffic.¹²⁸

121. See *Utahns II*, 305 F.3d at 1165 (describing requirement for FEIS information). NEPA and the Corps' regulations require that a federal agency verify if the permit applicant supplied accurate information. See *id.* (citation omitted) (discussing that agency must supply reliable and correct information).

122. See *id.* (noting that Corps lacked records relating to estimated cost of D&RG or Legacy Parkway Project).

123. See *id.* (explaining project cost analysis). The Tenth Circuit did not want to imply that federal agencies must provide a tremendously detailed cost estimate. See *id.* at 1166, n.6.

124. See *id.* at 1166 (explaining importance of relative costs in analyzing EIS alternative).

125. See *id.* at 1165-1166. Additionally, the Tenth Circuit looked at the federal agencies' other reason for eliminating D&RG as an alternative, which included its significant impact to existing development, but it did not make a decision regarding such reason because the record was insufficient. See *id.* at 1166.

126. See *Utahns II*, 305 F.3d at 1170 (reasoning that agencies faced reasonable and distinct alternative).

127. See *id.* at 1169. The Utahns also claimed that the FEIS failed to objectively explore and evaluate whether changing the project's sequence would create less environmental consequences. See *id.* The Utahns submitted expert opinion explaining why public transit should be expanded before building new roads. See *id.* at 1170.

128. See *id.* at 1169-70 (discussing failure to consider changing project's construction sequence).

The Tenth Circuit rejected both UDOT's and the FHWA's arguments that future decisions regarding Utah's public transit are not reasonable alternatives to the proposed project.¹²⁹ Both federal agencies argued that expanding public transit was too speculative and, if public transit was to expand, it would occur too distant in time to consider it as a practicable alternative.¹³⁰

The Tenth Circuit stated that expanding public transit before constructing the Legacy Parkway was a reasonable alternative to meet travel and population increases.¹³¹ It determined that the Agencies failed to take a "hard look" at this alternative because they did not rely on public comment, scientific findings and its own analysis.¹³² Thus, the Tenth Circuit upheld the Utahns' argument, holding that altering the sequence of the proposed project was not an unreasonable or a speculative alternative.¹³³

3. *Segmentation of Transportation Projects*

In support of its claim, the Utahns also argued that NEPA requires that the Agencies prepare a single EIS for the three components of the proposed project.¹³⁴ The Agencies countered by arguing that each component would serve its own independent transportation purpose.¹³⁵ The Tenth Circuit held that constructing Legacy Parkway project would satisfy only one of the Shared Solution project's three components.¹³⁶ Consequently, the Tenth Circuit determined that each component under the Shared Solution plan must have its own EIS.¹³⁷

129. See *id.* at 1170. The United States Department of Transportation argued that adding the rail transit would occur five to fifteen years after the Legacy Parkway. See *id.* (discussing proposed sequence of project).

130. See *id.* (stating Utah had not yet met federal rail funding requirements).

131. See *Utahns II*, 305 F.3d at 1170 (finding three problems with UDOT's argument: (1)expanding public transit is broader than just rail transit; (2)disputed regional transit choices have not been decided and are not to be decided in future; and (3)focus of FEIS is to meet year 2020s transportation need).

132. See *id.* (noting Agencies must thoroughly examine alternatives). For further discussion on "hard look", see *supra* note 52-55 and accompanying text.

133. See *Utahns II*, 305 F.3d at 1170 (finding alternative sequencing would not have had significant environmental impacts).

134. See *id.* (characterizing all three projects as connected and similar actions, which require single EIS).

135. See *id.* at 1184 (explaining federal agencies' counter-argument that projects can be reported in separate EISs).

136. See *id.* at 1182 (noting travel demand predictions show that by 2020 Utah will need multi-model transportation solutions to meet its travel demands).

137. See *id.* at 1183-84. For discussion on connected actions see *supra* note 84 and accompanying text.

The Tenth Circuit applied NEPA's statutory language to refute the Utahns' argument.¹³⁸ The Tenth Circuit relied on NEPA requirement that federal agencies should discuss "connected" actions in a single EIS.¹³⁹ The court reasoned that each project component can serve its transportation purpose independent of the other two components.¹⁴⁰ Furthermore, the Tenth Circuit rationalized that the Legacy Parkway component may proceed without reconstructing I-15 and therefore, the Legacy Parkway does not "automatically trigger" reconstructing I-15.¹⁴¹

B. NEPA Responsibility and Conflict of Interest

Here, the Corps and the FHWA allowed UDOT and its contractors to prepare the EIS.¹⁴² The Utahns' contended that this violated NEPA because the federal agencies did not sufficiently participate and review the work of UDOT and that of UDOT's contractors.¹⁴³ The Tenth Circuit's interpretation of section 1506.5(C) of NEPA supported its decision that the Corps and the FHWA wrongfully allowed UDOT to prepare the FEIS.¹⁴⁴

The Tenth Circuit examined whether any appropriate remedy, such as an injunction or requiring a new EIS, existed.¹⁴⁵ The Tenth

138. See *Utahns II*, 305 F.3d at 1182 (describing proper scope of EIS).

139. See *id.* at 1182-83 (relying on NEPA for holding).

140. See *id.* at 1184. The FEIS estimated that the Legacy Parkway would accommodate sixteen percent of the year 2020 travel demand, reconstructing I-15 would accommodate eight percent and the expanded transit would accommodate twelve percent. *Id.* (citing *I Aplee*, App. At 323).

141. See *id.* (noting that I-15 project will occur, if at all, after Legacy Parkway).

142. For further discussion on EIS preparation, see *supra* notes 59-67 and accompanying text.

143. See *Utahns II*, 305 F.3d at 1185 (discussing Utahns' argument that EIS used for Corps' analysis was insufficient and unlawful). Furthermore, the Utahns claim the EIS was legally insufficient because UDOT, a state agency, prepared the EIS for a state-funded project. See *id.*

144. See *id.* at 1186 (finding strong support in C.F.R. that wrong party prepared FEIS). 40 C.F.R. pt. 1506.5(c) provides:

[A]ny environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency . . . Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents.

Council of Environmental Quality, Other Requirements of NEPA, 40 C.F.R. pt. 1506.5(c) (2003).

145. See *Utahns II*, 305 F.3d at 1186 (noting district court never addressed issue of remedies).

Circuit turned to precedent for insight.¹⁴⁶ Relying on such precedent, the Tenth Circuit determined that a conflict of interest did not exist because the parties did not agree on a predetermined result.¹⁴⁷ Consequently, the Tenth Circuit, while determining that the Agencies wrongfully allowed UDOT to prepare the FEIS, concluded that UDOT's EIS was not invalid because of a conflict of interest.¹⁴⁸ Ultimately, however, the Tenth Circuit did find the FEIS inadequate on other grounds.

C. CWA

1. *Practicable Alternatives*

a. *D&RG Regional Alignment*

The Tenth Circuit concluded that the Corps violated the CWA because it issued the section 404(b) permit based on insufficient information.¹⁴⁹ The Utahns argued that the Corps applied an incorrect legal standard in rejecting D&RG as an alternative to the Legacy Parkway.¹⁵⁰ The Tenth Circuit interpreted that the CWA's test for issuing a permit asks whether the alternative with the smallest impact on wetlands was impracticable, not whether the alternative cost less, or had a less environmental impact.¹⁵¹ However, the Tenth Circuit noted that NEPA, not the CWA, governs the FEIS.¹⁵² As a result, the Tenth Circuit found that the Corps was not required to select the best alternative or even the alternative with the smallest impact on wetlands.¹⁵³

146. See *id.* (relying on *AWARE*'s analysis for determining whether conflict of interest existed). For further discussion on *AWARE*, see *supra* notes 72-75 and accompanying text.

147. See *Utahns II*, 305 F.3d at 1186 (relying on precedent, which found that when predetermined results exist and federal agencies do not independently review EIS, then there is NEPA violation).

148. See *id.* (rejecting Utahns' claim that bias and "result-oriented nature" tainted analysis of Legacy Parkway).

149. See *id.* at 1187 (noting permit applicant has burden of proof to show permit guidelines were complied with).

150. See *id.* at 1186-87 (arguing CWA test is whether alternative with less wetlands impact is "impracticable" and UDOT, as permit applicant, must provide "clear and convincing" evidence proving impracticability).

151. See *id.* at 1186 (explaining correct CWA test for considering alternatives).

152. See *Utahns II*, 305 F.3d at 1186 (stating which environmental statute correctly applies). "Under CWA, the test is not whether a proposed project is 'better' than an alternative with less wetlands impact because it would cost less and have less impact on existing and future development." *Id.*

153. See *id.* at 1186-87 (mandating that federal agencies "rigorously explore and objectively evaluate all reasonable alternatives").

Furthermore, the Utahns contended that the Corps did not meet the CWA's impracticability test.¹⁵⁴ Relying on its discussion of NEPA cost analysis, the Tenth Circuit found that the Corps violated its own regulations by failing to verify the alternative's cost estimates.¹⁵⁵ The Tenth Circuit supported this conclusion by looking to the lack of evidence that D&RG's impacts made it impracticable.¹⁵⁶ Accordingly, the Tenth Circuit held that the Corps arbitrarily and capriciously issued the permit because it based this decision on insufficient information regarding D&RG's practicability.¹⁵⁷

b. Narrower Right of Way

In addition, the Tenth Circuit concluded that the Corps improperly issued the section 404(b) permit because it ignored modifying the width of the highway's median as an alternative.¹⁵⁸ The Tenth Circuit stated that the CWA test does not involve determining whether the proposal features would make a more desirable project.¹⁵⁹ Rather, the test forces agencies to determine whether environmentally friendly alternatives are feasible.¹⁶⁰

After examining the relationship between the highway project's purpose (reducing traffic) and the possible alternative of narrowing the median, the Tenth Circuit found UDOT's proposed wider median had no relevance to the project's purpose.¹⁶¹ Thus, the Tenth Circuit held that the Corps should have examined a narrower median as a rational alternative because such alternative would reduce traffic.¹⁶²

The Tenth Circuit affirmed the lower court's decision in part and reversed and remanded it in part.¹⁶³ The court found that the

154. *See id.* (stating CWA definition of practicable).

155. *See id.* (holding that Corps lacked sufficient justification for issuing permit because permit was based solely on high costs).

156. *See id.* (noting evidence existed that D&RG was more highly developed compared to Legacy Parkway).

157. *See Utahns II*, 305 F.3d at 1187 (determining permit was unlawfully issued).

158. *See id.* at 1189 (reasoning that Corps failed to rationally assess narrower median's practicability).

159. *See id.* at 1188 (explaining CWA test).

160. *See id.* 1188-89 (stating that if such alternative exists, then CWA mandates that federal agencies consider and select alternative unless proven impracticable).

161. *See id.* at 1189 (exploring relationship between project's purpose and modifications to highway).

162. *See Utahns II*, 305 F.3d at 1189 (relying on CWA, which prevents Corps from issuing § 404(b) permit if less damaging practicable alternative exists).

163. *See id.* at 1192 (affirming in part and reversing and remanding in part District Court's decision). The district court concluded that the federal agencies'

Agencies inadequately prepared the FEIS because they failed to consider reasonable alternatives, such as a railway or alternative sequencing of the project.¹⁶⁴ In addition, the Tenth Circuit concluded that the Corp's arbitrarily and capriciously issued the section 404(b) permit by relying on insufficient information and failing to make an informed decision.¹⁶⁵

V. CRITICAL ANALYSIS

In *Utahns II*, the Tenth Circuit provided several hurdles for federal agencies, state agencies and contractors to overcome when developing transportation projects.¹⁶⁶ Conversely, without much discussion, the Tenth Circuit aided federal agencies, state agencies and contractors by finding that segmentation is permissible in certain situations.¹⁶⁷ In this regard, the Tenth Circuit's determination may enable federal agencies to make significant cumulative impacts appear insignificant by segmenting the project.¹⁶⁸

A. Contractor Conflict of Interest

Relying on NEPA's statutory language, the Tenth Circuit properly found that the Agencies erroneously adopted UDOT's EIS, despite finding no existing conflict of interest.¹⁶⁹ Under NEPA, a contractor who prepares an EIS must first submit a disclosure statement specifying that it has no financial interest or other interest in

actions were lawful under NEPA and the CWA. See *Utahns I*, 180 F. Supp. 2d 1286, 1291-92 (D. Utah 2001).

164. See *Utahns II*, 305 F.3d at 1192 (concluding that federal agencies incorrectly prepared FEIS). For further discussion on why FEIS was inadequate, see *supra* note 14 and accompanying text.

165. See *Utahns II*, 305 F.3d at 1192 (concluding that Corps did not consider narrower median as practicable alternative). As a result, the Tenth Circuit decided that the injunction should remain until the FHWA and the Corps resolved issues raised in the opinion. See Utah Department of Transportation, Legacy Parkway Project, available at <http://www.udot.utah.gov/legacy/> (last visited April 3, 2004) (stating litigation involved with Legacy Parkway).

166. See *Utahns II*, 305 F.3d at 1192 (finding that federal agencies must consider all reasonable alternatives and environmental impacts before issuing permits).

167. See *id.* at 1184 ("The components, although interrelated a part of an overall transportation plan, should individually contribute to alleviation of the traffic problems in the Northern Corridor, and are therefore not improperly segments as separate projects.").

168. See Thatcher, *supra* note 82 at 631 (explaining how impacts of smaller segments may appear less forbidding).

169. See *Utahns II*, 305 F.3d at 1186 (holding that Corps and FHWA incorrectly used UDOT's FEIS). Federal agencies must provide guidance and actively participate in the EIS process when a contractor prepared it. See *id.*

the project's outcome.¹⁷⁰ This requirement's purpose is "to minimize the conflict of interest inherent in the situation . . . [when] those outside the government . . . [come] to the government for money, leases or permits while attempting to analyze the environmental consequences of their getting it."¹⁷¹ If a contractor, who is preparing the EIS, allegedly has a conflict of interest, a court must determine whether the alleged conflict compromises the integrity and objectivity of NEPA process.¹⁷²

In *Utahns II*, the Tenth Circuit correctly held that the Corps and the FHWA erred in allowing UDOT and its contractors to prepare the FEIS.¹⁷³ The Agencies' actions in *Utahns II* were clearly distinguishable from the federal agencies' actions in *AWARE* and *Crawfish*.¹⁷⁴ In *AWARE* and *Crawfish*, the courts found that the federal agencies overcame any potential conflict of interest by actively participating in NEPA process.¹⁷⁵ Conversely, in *Utahns II*, the Corps and the FHWA's failure to participate in the EIS preparation allowed the Tenth Circuit to properly conclude that the Agencies illegally delegated their NEPA responsibilities.¹⁷⁶

The Tenth Circuit correctly relied on *AWARE* to address whether the alleged conflict of interest compromised the overall integrity of NEPA process.¹⁷⁷ Unlike the district court, the Tenth Circuit did address this issue; however, the Tenth Circuit did not

170. See *AWARE*, 153 F.3d 1122, 1127 (1998) (quoting Council on Environmental Quality, Other Requirements of NEPA, 40 C.F.R. pt. 1506.5(c) (2001)) (describing proper disclosure statement).

171. See *Northern Crawfish Frog (Rana Areolata Circulosa) v. The Federal Highway Administration*, 858 F. Supp. 1503, 1526 (D. Kansas 1994) (citation omitted) (describing goal of disclosure statement).

172. See *AWARE*, 153 F.3d at 1129 (quoting *Citizens Against Burtlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991)) (emphasizing importance of maintaining integrity of NEPA process). When an EIS is challenged based on an alleged conflict of interest, the court must evaluate the agency's participation in and review of the EIS process as a factual matter and then determine whether it should be upheld. *Id.* (citation omitted).

173. See *Utahns II*, 305 F.3d at 1186 (reasoning that clear language of 40 C.F.R. pt. 1506.5(c) leads to such conclusion).

174. For further discussion of actions in *AWARE* and *Crawfish*, see *supra* notes 72-80 and accompanying text.

175. See *AWARE*, 153 F.3d at 1129 (finding Colorado Department of Transportation properly supervised over EIS process by independently reviewing all of contractor's analyses); see *Northern Crawfish Frog*, 858 F. Supp. at 1526 (finding FHWA carefully considered conflict of interest issue).

176. See *Utahns II*, 305 F.3d at 1186 (finding that agencies illegally delegated their obligations under NEPA).

177. See *id.* (finding *AWARE* informative and insightful).

provide a thorough discussion on the subject of conflict.¹⁷⁸ First, Tenth Circuit did not discuss the NEPA required disclosure statement for contractors preparing an EIS.¹⁷⁹ Based on the Tenth Circuit's opinion, it is unclear whether the disclosure statement plays a significant role in discovering and/or minimizing a conflict of interest.¹⁸⁰

A disclosure statement would reduce conflicts of interest and assure the public that the EIS analysis was prepared free of subjective and self-serving research and analysis.¹⁸¹ In *Utahns II*, the Tenth Circuit did not clarify whether UDOT had to submit a disclosure statement when the FHWA and the Corps simply adopted UDOT's DEIS.¹⁸² If UDOT participated in drafting the EIS, then the Tenth Circuit should have invalidated the EIS because a disclosure statement was not filed.¹⁸³

In *Utahns II*, however, the Tenth Circuit found there was no conflict of interest because there was no contract between the federal agencies and UDOT for a predetermined result.¹⁸⁴ Precedent shows that a conflict of interest can be a significant factor in determining an EIS's adequacy.¹⁸⁵ A serious conflict of interest could negate the goal of environmental regulations in providing a system of checks and balances.¹⁸⁶

In *AWARE*, the Tenth Circuit held that a federal agency's active role in the EIS process strengthened the integrity of the overall pro-

178. See *id.* (noting that district court failed to address conflict of interest issue). The Utahns presented to the Tenth Circuit four examples of bias that influenced the Legacy Parkway's EIS, including that the EIS' tone advocated a specific position. See *id.* (examining various forms of possible bias).

179. See *Northern Crawfish Frog*, 858 F. Supp. at 1527 (describing disclosure statements as method to prevent conflicts of interest).

180. See *Utahns II*, 305 F.3d at 1186 (lacking discussion of disclosure statements).

181. *Northern Crawfish Frog*, 858 F. Supp. at 1528 (citing Council on Environment, Other Requirements of NEPA, 40 C.F.R. pt. 1506.5 (c)) (explaining safeguards of disclosure statements).

182. See *Utahns II*, 305 F.3d at 1186 (finding EIS adequate without discussing disclosure statements).

183. See *Northern Crawfish Frog*, 858 F. Supp. at 1527 (requiring execution of disclosure statement in similar situation).

184. See *Utahns II*, 305 F.3d at 1186 (concluding that in this case there was no preordained result, but conflict of interest issue did merit court's concern).

185. See *AWARE*, 153 F.3d 1122, 1129 (10th Cir. 1998) (stating that ultimate question for court addressing alleged conflict of interest breach is whether breach compromised integrity of NEPA process).

186. See *Northern Crawfish Frog*, 858 F. Supp. at 1528 (discussing serious ramifications of conflict of interest affecting NEPA process).

cess, and, therefore, eliminated potential conflicts of interest.¹⁸⁷ In *Utahns II*, the Tenth Circuit overlooked this and diminished the importance of the FHWA's and the Corps' inactive role in the entire NEPA process.¹⁸⁸ If the Tenth Circuit would have conducted a more thorough analysis concerning whether NEPA's integrity was compromised, it most likely would have held the EIS inadequate on this ground.¹⁸⁹

B. Segmentation and the EIS

The Tenth Circuit held that the Corps permissibly segmented the Shared Solution Project under NEPA, explaining that the Legacy Parkway did not automatically trigger reconstructing I-15 and expanding the mass transit.¹⁹⁰ The Tenth Circuit stated that, given the deferential standard of review, it could not conclude that the FEIS was deficient because the federal agencies did not evaluate the whole project, its three components, in a single EIS.¹⁹¹ This appeared to be a victory for federal agencies, but environmental groups in future cases may still raise a segmentation challenge, arguing the Tenth Circuit reached its decision based on a deferential standard of review, and not NEPA's statutory language.¹⁹²

Despite the Utahns' valid arguments, the Tenth Circuit allowed the Agencies to segment the project.¹⁹³ Relying on *Piedmont* and *Custer County*, the Tenth Circuit correctly applied the independent utility test; however, it is unclear whether the court reached the proper conclusion.¹⁹⁴ In *Piedmont*, the Fifth Circuit permitted segmentation because each component clearly fulfilled an individ-

187. See *AWARE*, 153 F.3d at 1129 (rejecting plaintiff's argument that court failed to enforce conflict of interest provision to preserve public faith in NEPA process).

188. See *Utahns II*, 305 F.3d at 1186 (finding EIS was adequate because there was no predetermined result).

189. See *AWARE*, 153 F.3d at 1129, n.7 (explaining critical importance of public support).

190. For further discussion of "connected action," see *supra* note 84 and accompanying text.

191. See *Utahns II*, 305 F.3d at 1184.

192. See *id.* at 1184 (emphasizing its deferential standard of review, but not sufficiently emphasizing NEPA's language).

193. See *id.* at 1183-84. The Utahns argue that the transportation needs will not be met because the FEIS expressly stated that 2020s transportation needs will not be met without constructing both the Legacy Parkway and improving I-15. See *id.* at 1183 (emphasis added) (evaluating Utahns' argument).

194. See Thatcher, *supra* note 82, at 631 (stating that independent utility test is applied in segmentation cases).

ual transportation purpose.¹⁹⁵ In *Custer County*, the segment under dispute was specifically designed for one particular purpose.¹⁹⁶ Here, the Tenth Circuit stated that each component, including the Legacy Parkway component, should individually reduce traffic problems in the North Corridor.¹⁹⁷ However, with the Shared Solution project, certain components cannot be completed until other components are constructed, which raises serious doubts about whether each segment has a true individual purpose.¹⁹⁸

Assuming the Tenth Circuit correctly determined that each component had an individual transportation purpose and an independent utility, it is irrelevant that the components were part of an overall transportation plan.¹⁹⁹ As long as the Legacy Parkway component has an individual transportation purpose, it may require a separate EIS, even if it is part of an overall plan.²⁰⁰ If each component or segment has independent utility, then individual approval will not commit future resources or limit available alternatives.²⁰¹ The Tenth Circuit, like other courts, reinforced the idea that segmentation of a project is permissible in certain situations.²⁰²

VI. IMPACT

Considering the continual growth in Utah's population and travel demand, the Tenth Circuit's decision may significantly impact future cases involving proposed transportation plans to meet

195. See *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 439 (5th Cir. 1981) (explaining why segmentation was permitted). The Fifth Circuit held that segmentation was appropriate because the Brookwood Interchange Project would alleviate the congestion where the two highways intersect, whereas the DeKalb I-85 Segment should help improve traffic flow. See *id.* at 440-41 (explaining when segmentation is lawful).

196. See *Custer County Action Ass'n v. Garvey*, 256 F.3d 1024, 1037 (10th Cir. 2001) ("The Initiative was designed specifically to provide the necessary airspace for the 140th Tactical Fighter Wing of the Colorado ANG to be able to train with the F-16 fighter jet under realistic conditions, and to make changes in commercial aircraft arrival and departure corridors required for operation of the new Denver International Airport.").

197. See *Utahns II*, 305 F.3d at 1184 (stating relationship of components to overall transportation project).

198. See *id.* at 1183-84 (stating project's order of construction and transportation purpose that each component will have).

199. See *Piedmont*, 637 F.2d at 441 (holding that interrelated parts of overall transportation plan lawfully could be segmented).

200. For further discussion on "independent utility," see *supra* note 86 and accompanying text.

201. See *Piedmont*, 637 F.2d at 441 (dismissing possible problems with independent utility test).

202. See *Utahns II*, 305 F.3d at 1184 (discussing various demands for transportation plans).

these demands.²⁰³ Taking a more aggressive approach than the lower court, the Tenth Circuit's holding requires federal agencies and contractors to take a much "harder look" at a project's reasonable alternatives and possible adverse environmental impacts.²⁰⁴ Judge Jenkins, who decided this case in the District Court, believed that if one disagreed with the policy decisions made, as was the case here, they should seek change through the ballot box and the election process, and not the court.²⁰⁵ The lower court's decision enabled federal agencies and contractors to satisfy NEPA requirements by meeting the bare minimum, broadly applying NEPA's language.²⁰⁶

Conversely, the Tenth Circuit followed a more strict reading of NEPA and the CWA.²⁰⁷ Accordingly, federal agencies must actively participate in preparing an EIS by considering all reasonable alternatives, and all environments impacts.²⁰⁸ Under the Tenth Circuit standard, an agency cannot merely adopt an EIS drafted by a contractor.²⁰⁹ Moreover, the Tenth Circuit moves slightly away from NEPA's purpose by allowing project segmentation.²¹⁰

This case appears to be an important win for environmental groups.²¹¹ In future cases, environmental groups may rely on *Utahns II* to argue that the federal agencies must rigorously consider the potential adverse impacts on the environment when developing and proposing transportation plans.²¹²

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203. For further discussion of Utah's future transportation needs, see *supra* notes 4-5 and accompanying text.

204. See generally *Utahns II*, 305 F.3d 1152 (finding EIS inadequate because it failed to consider reasonable alternatives and impacts on wildlife and wetlands).

205. See *Utahns I*, 180 F. Supp. 2d 1286, 1292-93 (D. Utah 2001) (noting that courts cannot alter legislative policy choices).

206. See *id.* at 1292 (holding EIS was adequate even though federal agencies did not consider reasonable alternatives).

207. For further discussion on NEPA, see *supra* notes 45-58 and accompanying text.

208. See generally *Utahns II*, 305 F.3d 1152 (finding FEIS inadequate for reasons stated).

209. See *id.* at 1184-86 (explaining federal agency's NEPA responsibility).

210. For further discussion of segmentation, see *supra* notes 81-102 and accompanying text.

211. See Karkkainen, *supra* note 46, at 910 (noting that satisfying NEPA requirements forces federal agencies to think more carefully about environment before acting).

212. See *Utahns II*, 305 F.3d at 1166 (examining federal agencies' requirements under NEPA).

